

The Hague Convention on the Law Applicable to Products Liability

The Hague Conference on Private International Law is dedicated to seeking unification among nations of the rules of conflict of laws. To this end, the Conference holds sessions at four-year intervals at which conventions are prepared on various conflict of laws subjects. It is naturally hoped that these conventions will be ratified by at least a substantial number of the 28 members of the Conference.¹

At a meeting of a Special Commission of the Conference in October 1967, the United States representative suggested that the law applicable to products liability would be a suitable topic for a convention. In part, this was because the area is largely unexplored with the result that at least most countries could adhere to such a convention without seriously disturbing existing law. Also products liability is a field where there is need for certainty, uniformity and predictability of result, which are values that would be furthered by a convention. Likewise, a convention, even if it were not widely adopted, could be expected to have considerable influence upon subsequent legislation and court decisions.

This suggestion was warmly received. At the plenary session of the Hague Conference in October 1967 it was decided that a convention on the law applicable to products liability should be placed on the Conference agenda. Thereafter, a Special Commission was charged with the preparation of a preliminary draft of a Convention which would serve as a basis for discussion at the plenary session in 1972.² The Convention finally approved by the Conference in October 1972, which is set forth in full at the end of this paper,

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¹The member nations are Argentina, Australia, Belgium, Brazil, Canada, Czechoslovakia, Denmark, Finland, France, Germany, Greece, Ireland, Israel, Italy, Japan, Luxembourg, The Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, United Arab Republic, United Kingdom, United States (which joined in 1964) and Yugoslavia.

²The draft convention prepared by the Special Commission is discussed in Reese, *Products Liability and Choice of Law: The United States Proposals to the Hague Conference*, 25 VAND. L. REV. 29 (1972).

differs in many important respects from the preliminary draft. The writer served as United States Representative and as Rapporteur both at the meetings of the Special Commission and at the 1972 plenary session of the Conference.

The United States must decide in due course whether to adhere to the Convention. Such action has been recommended by the Committee on International Unification of Private Law of the American Bar Association.³ It seems likely that the question will eventually come before the House of Delegates of this Association. For this reason, among others, discussion of the Convention would appear warranted.

The Background

The United States can, it is felt, take real satisfaction in the Convention. Not only was it the country which first suggested the topic to the Hague Conference, it was also the country, which along with Norway, submitted the compromise proposal which obtained the support of a large majority of the delegates. The initial position of the United States was that the plaintiff should be given a choice between two or three laws, such as the law of the state of injury, the law of the state where the plaintiff acquired the product and the law of the principal place of business of the defendant, provided that in the case of the state of injury or of acquisition the defendant could reasonably have foreseen that the particular product, or his products of the same type, would come into the state through commercial channels. It soon became apparent, however, that this position would obtain the support of at most one-third of the delegates. Accordingly, the United States and Norway submitted a compromise proposal which essentially embodied the provisions now found in Articles 4-6. These provisions give the plaintiff a limited power of choice and, more important, supply what is thought to be a satisfactory solution of the problem.

United States adherence to the Convention would not prejudice American manufacturers. By and large, this country has rules of products liability that are more favorable to the consumer than any other country in the world.⁴ Accordingly, an American manufacturer would usually benefit when under the terms of the Convention his liability was determined by some foreign law rather than by the law of a state of the United States. Also such a manufacturer could hardly complain of those situations where the Convention would call for application of the law of his home state.

United States adherence to the Convention would also not seriously disturb

³Special acknowledgement should here be made of Professor Beverly May Carl, the chairperson of this committee. Her advice and assistance in the preparation of this paper are much appreciated.

⁴Sommerich, *A Comparative Survey of Products Liability Law as Applied to Motor Vehicles*, 2 INT'L LAW. 98 (1967)(discusses the law of Austria, Belgium, England, France, Germany, Italy, The Netherlands, Soviet Union, Spain, Sweden, Switzerland and the United States); Szladits, *Comparative Aspects of Products Liability*, 16 BUFFALO L. REV. 229 (1966).

existing law. No single rule has yet emerged in this country with respect to the choice of law rules for products liability. As stated in a recent article:

... there is authority in the United States for basing recovery against the supplier on the law of the state in which the plaintiff suffered injury by reason of his use or consumption of the product, on the law of the state in which the plaintiff received possession of the product, or on the law of the state of manufacture or sale. The rationales employed by the courts in these cases have ranged all the way from a strict vested rights approach, under which the law of the state of injury is applied, to a modern governmental interests analysis. What seems to emerge clearly from the cases taken as a whole, irrespective of the rationales employed, is a judicial desire to apply a law favorable to the plaintiff. The great majority of the cases, and particularly the more recent ones, have applied a law that would permit recovery against the supplier. . . .⁵

Analysis of the Convention

As indicated by its title, the scope of the Convention is restricted to international cases involving products liability. The Convention is therefore not concerned with the liability of the owner or user of a product of foreign origin. The Convention, for example, would not apply to the liability of the owner or driver of an automobile of foreign manufacture for the injuries caused to another in the United States. Likewise, as noted above, the Convention is limited to international cases. Hence, it would not apply to a products liability case involving purely United States contacts as, for example, a suit by a Pennsylvania resident against a Michigan manufacturer of a defective automobile to recover for injuries suffered by reason of the defect in Arizona. On the other hand, the Convention would apply if, in the hypothetical situation set forth immediately above, the defendant manufacturer had been either French or German. By reason of Article 13, a United States court would not be required to apply the Convention, even in a products liability case involving a foreign contact, "where a State with a unified system of law would not be bound to apply the law of another State by virtue of Articles 4 and 5 of this Convention." This last limitation is treated at greater length in the discussion of Article 13 which appears below.

The scope, or field of application, of the Convention is set forth in Articles 1-3. Subject to one important exception, Article 1 provides that the Convention shall be applied, "irrespective of the nature of the proceedings," to determine "the law applicable to the liability of the manufacturers and other persons specified in Article 3 for damage caused by a product." This damage may result from a defect in the product, from a misdescription of the product or from "a failure to give adequate notice of its qualities, its characteristics or its method of use." The exception is that the Convention does not apply in situations where the product was transferred by the defendant to the person suffering damage. It

⁵Reese, note 2 *supra*, at 37-38; see also Kuhne, *Choice of Law in Products Liability*, 60 CALIF. L. REV. 1 (1972).

was felt that contractual relationships of this sort are adequately handled by existing law and that to disturb this existing law might lessen the chances for widespread adoption of the Convention.

Article 2 defines three key words in the Convention: product, damage and person. This article makes clear that the Convention is intended to cover all products, whether natural or industrial, raw or manufactured, movable or immovable. The convention likewise applies to all kinds of damage, whether these take the form of personal injuries, damage to tangible property (land and chattels) or out-of-pocket (economic) loss. Damage to the product itself and any consequential out-of-pocket (economic) loss are excluded, however, unless accompanied by other damage. Finally, Article 2 provides that the Convention applies to both natural and legal persons, such as corporations and partnerships.

Article 3 is concerned with the categories of persons whose liability is regulated by the Convention. This article has a broad scope of application. It states that the Convention applies to manufacturers of a product, to producers of a natural product, to other suppliers of a product, such as vendors, bailors and donors, to "other persons, including repairers and warehousemen, in the commercial chain of preparation or distribution of a product," and to the "agents or employees" of the persons mentioned above.

Articles 4-6 are the key provisions of the Convention, since they state the basic rules for determining the applicable law. Articles 4 and 5 provide that either the "State of the place of injury" or the "State of the habitual residence of the person directly suffering damage" will be the state of the applicable law if, in addition, one of two or more designated contacts is located there. So, under Article 4, "the State of the place of injury" will be the state of the applicable law if this state is also the place where the person directly suffering damage had his habitual residence or acquired the product or where the defendant had his principal place of business. Under Article 5, and "[n]otwithstanding the provisions of Article 4, . . . the State of the habitual residence of the person directly suffering damage" will be the state of the applicable law if in addition this State is the place where the defendant had his principal place of business or where the product was acquired by the person directly suffering damage. Then under Article 6, if there is no such combination of contacts as envisaged in Articles 4 or 5, the plaintiff is given the choice of basing his claim on the law of either the state of the place of injury or the state of the principal place of business of the defendant. By reason of Article 7, however, liability cannot be imposed under Articles 4-6 by application of the law of the place of injury or of the law of the habitual residence of the person directly suffering damage if the defendant "establishes that he could not reasonably have foreseen that the product or his own products of the same type would be made available in [these States] through commercial channels." If, by reason of lack of foreseeability, liability cannot be imposed under any of the above-mentioned laws, the case will be decided under

the law of the principal place of business of the defendant.

A word should perhaps here be said with respect to the meaning of "habitual residence." This term is used in the Hague Conventions as a substitute for "domicile," primarily because "domicile" bears different meanings in American and English law. As used in the Hague Conventions, "habitual residence" bears essentially the same meaning as does "domicile of choice" in American law.⁶

It seems reasonable to suppose that the great majority of cases will fall within either Article 4 or Article 5 of the Convention. These articles provide for both predictability of result and ease of application, since each calls for the application of the law of a state which, usually at least, will be easily identifiable. Likewise, these articles insure against the application of what might be thought to be a fortuitous law by requiring that two important contacts be located in a state before that state can be selected as the state of the applicable law. Then only in the rare case, where neither the injury nor the habitual residence of the person directly suffering damage is grouped in a state with another one of the contacts mentioned in Articles 4 and 5, is the plaintiff given a choice. This choice is limited in two ways. At most, the plaintiff can only choose between two laws, the law of the principal place of business of the defendant and the law of the place of injury. And the latter law may not be chosen if the defendant "establishes" lack of foreseeability under the provisions of Article 7. In other words, the Convention may be said to treat with an even hand both the plaintiff and the defendant. Under limited circumstances, the plaintiff is given the power to choose between two laws. But in no event can the defendant be held subject to an unforeseeable law. As a result, there will be situations where the plaintiff must base his claim on the law of the state of the principal place of business of the defendant even though he, the plaintiff, has no connection whatsoever with that state.

Article 8 lists certain important issues that are to be determined by the law made applicable by the Convention. These issues are: (1) the basis and extent of liability; (2) the grounds for exemption from liability, any limitation of liability and any division of liability; (3) the kinds of damages for which compensation may be due; (4) the form of compensation and its extent; (5) the question whether a right to damages may be assigned or inherited; (6) the persons who may claim damages in their own right; (7) the liability of a principal for the acts of his agent or of an employer for the acts of his employee; (8) the burden of proof insofar as the rules of the applicable law in respect thereof pertain to the law of liability; (9) rules of prescription and limitation, including rules relating to the commencement of a period of prescription or limitation, and the interruption and suspension of this period. The wording of Article 8 makes

⁶For a more detailed discussion, see Cavers, "*Habitual Residence: A Useful Concept?*", 21 *AM. U.L. REV.* 475 (1972).

clear that it is not intended to be exclusive; still other issues should undoubtedly be determined by the applicable law. The article does indicate that the Convention is intended to have a broad scope and to cover at least the great majority of issues that may arise in a products liability case.

Article 9 is directed to the situation where the product is first introduced into the market in a state other than the one whose law is made applicable by Articles 4-6. In such a situation, the court is authorized, but not required, to give "consideration . . . to the rules of conduct and safety" of the first state. The court may also, of course, give consideration, and indeed may give exclusive consideration, to the rules of conduct and safety prevailing in the state whose law is made applicable by Articles 4-6.

A hypothetical situation may make clearer the reach of Article 9. Suppose that an automobile, which was manufactured in state X by a manufacturer whose principal place of business is in X, is first introduced into the market in state Y and is then taken to state Z, where it is purchased by one A, whose habitual residence is in Z. Suppose further that A is injured in an accident in Z and that this injury would not have occurred if A had been wearing seat belts. The automobile, however, was not equipped with seat belts. Automobiles are not required to be equipped with seat belts by the Y rules of conduct and safety but are required to be so equipped by the rules of Z, which is the state whose law is made applicable by the Convention. By virtue of Article 9, the court would be free to apply the rules of conduct and safety of either Y or Z. The court would be free, in other words, to find for the manufacturer by application of the Y rules, or to find for A by application of the rules of Z.

It goes without saying that Article 9 only has significance in situations where the state where the product was first introduced into the market is not also the state whose law is made applicable by the Convention.

Article 10 follows the practice of the Hague Conference by giving a narrow scope of application to the public policy ("ordre public") exception. The article provides that application of a law made applicable by the Convention may only be refused "where such application would be manifestly incompatible with public policy (ordre public)." "Ordre public" is the civil law counterpart of "public policy." The terms are roughly synonymous, and neither is capable of precise definition.

Article 11 is an important provision since it requires a Contracting State to treat the convention as a uniform law. Under this article, a Contracting State is required to apply the law made applicable by the Convention without regard to any consideration of reciprocity and "even if the applicable law is not that of a Contracting State." It may bear repeating that the Convention only applies in international cases. Hence a state of the United States would remain free to apply its own rules of choice of law in cases where the contacts are grouped exclusively within the United States.

Articles 12-14 are directed to the peculiar problems of states, such as the United States, which are composed of territorial units, each with its own rules of law on the subject of products liability.

Under Article 12, each of such territorial units "shall be considered as a State" for the purpose of selecting the law made applicable by the Convention.

Article 13 is designed to avoid imposing upon such a state a greater obligation to apply the Convention than is imposed upon a state with a uniform system of law. This article provides that a state composed of territorial units each with its own rules of law on the subject of products liability shall not be required to apply the Convention in situations "where a State with a uniform system of law would not be bound to apply the law of another state by virtue of Articles 4 and 5 of this Convention." An example should make clear the purpose of this article. Suppose that the plaintiff, who has his habitual residence in New York, purchases in New Jersey an automobile of German manufacture and is injured in Idaho by reason of a defect in the automobile. Suppose further that the defendant manufacturer could have reasonably foreseen that the particular automobile, or automobiles of the same type, would be available through commercial channels in New York and New Jersey but that he could not have foreseen that they would be so available in Idaho. But for Article 13, a court sitting in the United States would be compelled by the Convention to apply German law, since there was no additional contact in either New York or New Jersey and Idaho law could not be applied under Article 7 because of lack of the requisite foreseeability on the part of the defendant. On the other hand, if all of these events had taken place in a country, such as France, with a unified system of law, the law of that country would be applicable under the Convention. This result might be thought to discriminate against a federal state, and accordingly it is freed in such a case from the obligation of applying the Convention.

Article 14 contains a federal-state clause which permits a state composed of units each with its own rules of law on the subject of products liability to declare the Convention applicable "to all its territorial units or only to one or more of them" and to "modify its declaration by submitting another declaration at any time." By reason of this article, the United States would be privileged to adhere to the Convention on behalf of only one or more of its constituent states. Such action would have the undesirable result of giving the Convention unequal application throughout the United States. The United States did not request inclusion of this article in the Convention; it is one of the standard provisions found in a number of Hague Conventions.

Article 15 is designed to avoid conflicts between conventions insofar as this may be possible. It provides that the Convention "shall not prevail over other Conventions in special fields... which contain provisions concerning products liability" and to which the Contracting States are or may become parties.

Article 16 states the only two reservations that can be made by a Contracting State in adhering to the Convention. Pursuant to this Article, a Contracting State may reserve the right not to apply the Convention (a) to issues of prescription and limitation and (b) to raw agricultural products. The first of these provisions was inserted at the request of the United States, because it is the general view in this country that questions of limitation are determined by the law of the forum rather than, as provided in the Convention, by the generally applicable law. The possibility of making such a reservation might, it was felt, make it easier for the United States to adhere to the Convention.

The remaining articles are final clauses found in all Hague Conventions.

Appendix

CONVENTION ON THE LAW APPLICABLE TO PRODUCTS LIABILITY

The States signatory to the present Convention,

Desiring to establish common provisions on the law applicable, in international cases, to products liability,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions—

Article 1

This Convention shall determine the law applicable to the liability of the manufacturers and other persons specified in Article 3 for damage caused by a product, including damage in consequence of a misdescription of the product or of a failure to give adequate notice of its qualities, its characteristics or its method of use.

Where the property in, or the right to use, the product was transferred to the person suffering damage by the person claimed to be liable, the Convention shall not apply to their liability *inter se*.

This Convention shall apply irrespective of the nature of the proceedings.

Article 2

For the purposes of this Convention—

a. the word “product” shall include natural and industrial products, whether raw or manufactured and whether movable or immovable;

b. the word “damage” shall mean injury to the person or damage to property as well as economic loss: however, damage to the product itself and the consequential economic loss shall be excluded unless associated with other damage;

c. the word “person” shall refer to a legal person as well as to a natural person.

Article 3

This Convention shall apply to the liability of the following persons—

1. manufacturers of a finished product or of a component part;
2. producers of a natural product;
3. suppliers of a product;
4. other persons, including repairers and warehousemen, in the commercial chain of preparation or distribution of a product.

It shall also apply to the liability of the agents or employees of the persons specified above.

Article 4

The applicable law shall be the internal law of the State of the place of injury, if that State is also—

- a. the place of the habitual residence of the person directly suffering damage, or
- b. the principal place of business of the person claimed to be liable, or
- c. the place where the product was acquired by the person directly suffering damage.

Article 5

Notwithstanding the provisions of Article 4, the applicable law shall be the internal law of the State of the habitual residence of the person directly suffering damage, if that State is also—

- a. the principal place of business of the person claimed to be liable, or
- b. the place where the product was acquired by the person directly suffering damage.

Article 6

Where neither of the laws designated in Articles 4 and 5 applies, the applicable law shall be the internal law of the State of the principal place of business of the person claimed to be liable, unless the claimant bases his claim upon the internal law of the State of the place of injury.

Article 7

Neither the law of the State of the place of injury nor the law of the State of the habitual residence of the person directly suffering damage shall be applicable by virtue of Articles 4, 5 and 6 if the person claimed to be liable establishes that he could not reasonably have foreseen that the product or his own products of the same type would be made available in that State through commercial channels.

Article 8

The law applicable under this Convention shall determine, in particular—

1. the basis and extent of liability;
2. the grounds for exemption from liability, any limitation of liability and any division of liability;
3. the kinds of damage for which compensation may be due;
4. the form of compensation and its extent;
5. the question whether a right to damages may be assigned or inherited;
6. the persons who may claim damages in their own right;
7. the liability of a principal for the acts of his agent or of an employer for the acts of his employee;
8. the burden of proof insofar as the rules of the applicable law in respect thereof pertain to the law of liability;
9. rules of prescription and limitation, including rules relating to the commencement of a period of prescription or limitation, and the interruption and suspension of this period.

Article 9

The application of Articles 4, 5 and 6 shall not preclude consideration being given to the rules of conduct and safety prevailing in the State where the product was introduced into the market.

Article 10

The application of a law declared applicable under this Convention may be refused only where such application would be manifestly incompatible with public policy ("ordre public").

Article 11

The application of the preceding Articles shall be independent of any requirement of reciprocity. The Convention shall be applied even if the applicable law is not that of a Contracting State.

Article 12

Where a State comprises several territorial units each of which has its own rules of law in respect of products liability, each territorial unit shall be considered as a State for the purposes of selecting the applicable law under this Convention.

Article 13

A State within which different territorial units have their own rules of law in respect of products liability shall not be bound to apply this Convention where a State with a unified system of law would not be bound to apply the law of another State by virtue of Articles 4 and 5 of this Convention.

Article 14

If a Contracting State has two or more territorial units which have their own rules of law in respect of products liability, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them, and may modify its declaration by submitting another declaration at any time.

These declarations shall be notified to the Ministry of Foreign Affairs of the Netherlands, and shall state expressly the territorial units to which the Convention applies.

Article 15

This Convention shall not prevail over other Conventions in special fields to which the Contracting States are or may become Parties and which contain provisions concerning products liability.

Article 16

Any Contracting State may, at the time of signature, ratification, acceptance, approval or accession, reserve the right—

1. not to apply the provisions of Article 8, subparagraph 9;
2. not to apply this Convention to raw agricultural products.

No other reservations shall be permitted.

Any Contracting State may also when notifying an extension of the Convention in accordance with Article 19, make one or more of these reservations, with its effect limited to all or some of the territories mentioned in the extension.

Any Contracting State may at any time withdraw a reservation it has made; the reservation shall cease to have effect on the first day of the third calendar month after notification of the withdrawal.

Article 17

This Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Twelfth Session.

It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 18

Any State which has become a Member of the Hague Conference on Private International Law after the date of its Twelfth Session, or which is a Member of the United Nations or of a specialised agency of that Organisation, or a Party to the Statute

of the International Court of Justice may accede to this Convention after it has entered into force in accordance with Article 20.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 19

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

Article 20

This Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance or approval referred to in the second paragraph of Article 17. Thereafter the Convention shall enter into force

- for each State ratifying, accepting or approving it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance or approval;
- for each acceding State, on the first day of the third calendar month after the deposit of its instrument of accession;
- for a territory to which the Convention has been extended in conformity with Article 19, on the first day of the third calendar month after the notification referred to in that Article.

Article 21

This Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 20, even for States which have ratified, accepted, approved or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands, at least six months before the expiry of the five year period. It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 22

The Ministry of Foreign Affairs of the Netherlands shall notify the States Members of the Conference and the States which have acceded in accordance with Article 18, of the following—

1. the signatures and ratifications, acceptances and approvals referred to in Article 17;
2. the date on which this Convention enters into force in accordance with Article 20;
3. the accessions referred to in Article 18 and the dates on which they take effect;
4. the extensions referred to in Article 19 and the dates on which they take effect;
5. the reservations, withdrawals of reservations and declarations referred to in Articles 14, 16 and 19;
6. the denunciations referred to in Article 21.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the . . . day of . . . , 19 . . . , in the English and French

languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States Members of the Hague Conference on Private International Law at the date of its Twelfth Session.